Supreme Court, U.S.
FILED

94 1593 MAR 29 1995

OFFICE OF THE CLERK

No. ____

IN THE SUPREME COURT OF THE UNITED STATES
1994-95 Term

HILLARD E. AUSTIN
Petitioner

v.

The UNITED STATES OF AMERICA
Respondent

Petition for Writ of Certiorari to the Fifth Circuit Court of Appeals

Petition For Writ of Certiorari

DAVID M. KOPPA
Counsel of Record for Petitioner HILLARD E. AUSTIN
6910 SHANAHAN
BEAUMONT, TX 77706
(409)842-5504

49 pp

QUESTIONS PRESENTED FOR REVIEW

1. Petitioner testified in his behalf in a hotly contested federal criminal trial in which his defense depended upon his credibility. In the rebuttal phase of trial, the Prosecutor called two attorneys--one of whom had previously represented Austin, and the other was not sure if he had. Is the Attorney work product privilege violated when a Prosecutor elicits an opinion as to the Defendant's veracity from a prior attorney of the Defendant?

2. Is a Defendant's Attorney-client privilege violated when a Prosecutor elicits an opinion as to the Defendant's veracity from a prior attorney of the Defendant?

PARTIES

All parties to the proceeding appear in the caption of the case.

TABLE OF CONTENTS

QUESTIONS PRESENTED FOR REVIEW.....i

PARTIES.....ii

TABLE OF CONTENTS.....ii

TABLE OF AUTHORITIES.....iii

PETITION FOR WRIT OF CERTIORARI.....1

OPINIONS OF OTHER COURTS.....1

STATEMENT OF JURISDICTION.....2

RELEVANT LAW.....2

STATEMENT OF THE CASE.....2

REASONS FOR ALLOWING WRIT.....4

I. The Fifth Circuit's ruling on the Attorney Work Product Privilege Issue is contrary to Supreme Court Precedent.....4

II. By failing to follow its own precedent, the Fifth Circuit, in its ruling on the attorney-client privilege issue, so for departed from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's Power of Supervision. 10

CONCLUSION.....12

CERTIFICATE OF SERVICE.....12

APPENDIX A: Opinion of the Fifth Circuit Court of Appeals
APPENDIX B: Fifth Circuit's Order Denying Rehearing Dated December 30, 1994

INDEX OF AUTHORITIES

Federal Trade Commission v. Grolier,
462 U.S. 19, 25, 103 S.Ct. 2209,
76 L.Ed2d 387 (1988).....5,6

Hickman v. Taylor,
329 U.S. 495, 511, 67 S.Ct. 385, 91
L.Ed451(1946).....5,6

In re Grand Jury Proceedings,
604 F.2d 798 (3rd Cir.
1979).....4

In re Special September 1978 Grand Jury,
640 F.2d 49 (7th Cir.
1980).....4

In re Antitrust Grand Jury
805 F.2d 155,163 (6th Cir.
1986).....4

United States v. Neal,
27 F.3d 1035, 1048 (5th Cir.
1994).....9

United States v. Nobles,
422 U.S. 225, 95 S.Ct. 2160, 45 L.Ed2d
141(1975).....4,5

No. _____

IN THE SUPREME COURT OF THE UNITED STATES

HILLARD E. AUSTIN
Petitioner

v.

The UNITED STATES OF AMERICA
Respondent

Petition for Writ of Certiorari to the
Fifth Circuit Court of Appeals

TO THE HONORABLE JUDGES OF SAID COURT:

Petitioner, Hillard E. Austin, respectfully prays that a writ of certiorari issue to review the judgment and opinion of the U.S. Court of Appeals for the Fifth Circuit for the reasons set forth herein.

OPINIONS OF OTHER COURTS

The opinion of the U.S. Court of Appeals for the Fifth Circuit is found in the Appendix.

STATEMENT OF JURISDICTION

The Fifth Circuit entered its opinion in this case on December 7, 1994. The Court denied rehearing on December 30, 1994.

This Court has jurisdiction under 28 U.S.C. 1254(1) to review the petition of any party to any criminal case for purposes of granting the writ of certiorari after rendition of a judgment in the Court of Appeals.

RELEVANT LAW

This issues in this petition involve an interpretation of caselaw.

STATEMENT OF THE CASE

Hillard E. Austin was indicted on four counts of bribing IRS agent Linda Dickerson in violation of 18 USC Section 201 (b)(1)(A). After a jury trial, Austin was found guilty on all four counts and

was sentenced to serve three concurrent 33-month prison terms and two years on supervised release and to pay a $200 special assessment. Austin appealed to the Fifth Circuit.

At trial, the Prosecution called two witnesses who were attorneys, and who alleged that Austin had a bad character for truth and honesty. One attorney, William Hoffman, Jr., said that he had represented Austin in the past. The other attorney, William P. Wright, Jr. said Austin was in and out of his office, and he (Wright) "could" have done some work for Austin.

The trial was hotly contested. Austin testified in his own behalf at the trial. His defense rested upon his credibility.

REASONS FOR ALLOWING WRIT

I. The Fifth Circuit's ruling on the Attorney Work Product Privilege Issue is contrary to Supreme Court Precedent.

This Court in Hickman v. Taylor recognized a "qualified privilege for materials and opinion work product of an attorney acting for his client in anticipation of litigation". In Nobles, this Court recognized that the work product doctrine applies to criminal prosecutions. United States v. Nobles, 422 U.S. 225, 237-38, 95 S.Ct. 2160, 45 L.Ed2d 141 (1975) citing Hickman v. Taylor, 329 U.S. 495, 508, 67 S.Ct. 385, 91 L.Ed451 (1946). Either the client or the attorney may assert the work product privilege. In re Grand Jury Proceedings, 604 F.2d 798 (3rd Cir. 1979); In re Special September 1978 Grand Jury, 640 F.2d 49 (7th Cir. 1980); In re Antitrust Grand Jury, 805

F.2d 155,163 (6th Cir. 1986).

At its core, the work product doctrine shelters the mental processes of the attorney, providing a privileged area in which the attorney can prepare his client's case. Nobles, 422 U.S. at 238. Opinion work product is anything reflecting the attorney's mental impressions, opinions, conclusions, judgments or legal theories. Hickman v. Taylor, 329 U.S. 495, 511, 67 S.Ct. 385, 91 L.Ed451 (1946). Work product materials are immune from discovery by the adverse party unless the one seeking discovery can show a substantial need in connection with subsequent litigation. Federal Trade Commission v. Grolier, 462 U.S. 19, 27, 103 S.Ct. 2209, 76 L.Ed2d 387 (1988).

The work product immunity is not lost if the evidence was not prepared in

anticipation of the present litigation so long as it was prepared in anticipation of some litigation by a party to the present litigation. Grolier, 462 U.S. at 25 (1988)(construing Fed.R.Civ.Pro. 26(b)(3) to protect work product material prepared for any litigation as long as it was prepared by or for a party to the subsequent litigation).

An attorney's opinion of credibility of his client is necessarily prepared in anticipation of some litigation, even if the attorney is performing a routine business matter for the client. The opinion may not further the business matter as such, but will be useful to the attorney, and ultimately the client, if litigation later develops. Furthermore, an attorney's knowledge of his client's reputation in the community will also be

work product, as the evidence will be useful in future litigation.

Petitioner testified in his own defense at trial. His defense rested upon his own credibility. To attack petitioner's credibility, in the rebuttal phase of trial, the Government called attorneys' Hoffman and Wright to testify against Austin by expressing their opinions that Austin had a bad character for truth and honesty, and also to give their personal knowledge testimony as to Austin's reputation in the community. Austin objected, and sought a voir dire outside the jury's presence, offering to prove to the judge that the attorneys had previously represented Austin. The trial judge denied the voir dire.

The context of the questioning shows that the prosecutor was seeking the

opinion of each attorney as to Austin's veracity in addition to seeking personal knowledge testimony from each attorney as to Austin's reputation for veracity. As to Hoffman, the following exchange took place:

> Q. And are you familiar with his reputation and do have an opinion in the community for his reputation for being a truthful and honest person?
> A. Yes, I am familiar with it, and I do have an opinion.
> Q. And is that reputation, in your opinion, that his reputation for truth and honesty is good or is it bad?
> A. It is very bad.

TT. p. 288. As to Wright, the following exchange transpired:

> Q. And are you familiar with his reputation and do you have an opinion about whether he is a truthful and honest person?
> A. I do know his reputation and I do have an opinion.
> Q. And is that reputation in your opinion of truth and honesty, is that good or bad?
> A. That reputation would be bad.

TT. p. 293. On cross-examination, Wright said Austin was "in and out of the office"

and that Wright "could have" done some work for Austin. TT. p. 294.

The Fifth Circuit found that Hoffman and Wright did not disclose work product materials, and the Government did not ask them to do so.

The Fifth Circuit's finding is clearly contrary to Grolier and Hickman. Under Hickman, an attorney's opinion of credibility as well as conclusions as to a client's reputation in the community are mental impressions created in anticipation of litigation and are thus work product. Under Grolier, the fact that the opinion was prepared in anticipation of some other litigation is irrelevant.

This Court should grant the petition to correct an appellate court opinion contrary to precedent of this Court.

II. Alternatively, in its ruling on the attorney-client privilege issue, by failing to follow its own precedent, the Fifth Circuit so for departed from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's Power of Supervision.

Austin urged the attorney-client privilege was violated when the trial judge allowed attorneys Hoffman and Wright to testify against him. In the Fifth Circuit's opinion of December 7, 1994, the Appellate Court found no error, stating the testimony of attorneys Hoffman and Wright did not reveal any confidential communications. Specifically, the Fifth Circuit found that "Hoffman and Wright did not testify about any communications made in confidence for the purpose of obtaining legal counsel".

However, the attorney-client privilege is not limited to only communications by the client. Opinions of counsel are also within the attorney-

client privilege, as the privilege exists also to protect the attorney-client relationship. The attorney-client privilege:

> shields communications from the lawyer to the client only to the extent that these are based on, or may disclose, confidential information provided by the client or contain advice or opinions of the attorney (emphasis added).

United States v. Neal, 27 F.3d 1035, 1048 (5th Cir. 1994).

The opinions of the attorneys as to their former client's credibility are clearly are within the privilege under the Fifth Circuit's own precedent under Neal. Even the conclusions of the attorneys as to Austin's reputation in the community are ultimately opinions and within the privilege. As such, this Court should grant the petition on this issue.

CONCLUSION

For the reasons set forth above, Petitioner prays that a writ of certiorari issue to review the judgment and opinion of the Fifth Circuit Court of Appeals in this matter.

Respectfully submitted,

David M. Koppa
6910 Shanahan
Beaumont, TX 77706
Attorney for Hillard E. Austin

CERTIFICATE OF SERVICE

I, David M. Koppa, certify that a true copy of the foregoing instrument has been sent by first-class U.S. mail, postage paid, on this 27th day of March, 1995 to :

Solicitor General
Department of Justice
Washington, D.C. 20530

David M. Koppa

APPENDIX A

IN THE UNITED STATES COURT OF APPEALS

for the Fifth Circuit

No. 94-10019
No. 94-10331
(Summary Calendar

UNITED STATES OF AMERICA,
Plaintiff- Appellee
vs.
HILLARD E. AUSTIN,
Defendant-Appellant

Appeals from the United States District Court for the Northern District of Texas (1:93-CR-013-01) &(1:93-CV-11 (1:93-CR-13)

Before DUHE, WIENER and STEWART, Circuit Judges, PER CURIAM:[1]

Hillard E. Austin appeals his conviction and sentence for four counts of bribery of a public official in violation of 18 U.S.C. Sec. 201(b)(1)(A). He also appeals the district court's dismissal

---

[1]Local Rule 47.5 provides: "The publication of opinions that have no precedential value and merely decide particular cases on the basis of well-settled principles of law imposes needless expense on the public and burdens on the legal profession. " Pursuant to that Rule, the Court has determined that this opinion should not be published.

without prejudice of his motion to vacate his sentence pursuant to 28 U.S.C. Section 2255 and a motion for release pending a hearing on the Section 2255 motion. For the following reason, his conviction and sentence are affirmed. The appeal of the judgment denying his Section 2255 motion and his motion for release is dismissed as moot.

BACKGROUND

Hillard E. Austin was indicted on four counts of bribing IRS agent Linda Dickerson, who was acting group manager at the Abilene IRS office while the group manager was away from the office. At trial, the Government presented evidence that Austin tried to bribe Dickerson, in order to "get rid" of his tax liability of almost $300,000. After a jury trial, Austin was found guilty on all four counts and was sentenced to serve three

concurrent 33-month prison terms and two years on supervised release and to pay a $200 special assessment. Austin filed this appeal of his conviction and sentence.

Austin also filed a motion to correct, set aside or vacate sentence pursuant to 28 U.S.C. Section 2255, along with a motion for relase pending a hearing on the Section 2255 motion. He claimed ineffective assistance of counsel. In one order and one judgment, the district court dismissed the Section 2255 motion without prejudice and denied the motion for release pending disposition of the Section 2255 motion. The district court found that the Section 2255 was premature because Austin's direct appeal was still pending. The court denied the motion for release because there was no clear showing that he would succeed on the merits of his

Section 2255 motion. He appeals the dismissal of the Section 2255 motion and his motion for release pending a hearing on the Section 2255 motion.

Issues 1 through 7 of this opinion address the arguments that Austin raises in his direct criminal appeal. Issue 8 of this opinion analyzes the appeal of the dismissal of his Section 2255 motion and the related motion for release.

DISCUSSION

Issue 1 - Attorney-Client Privilege

Austin contends that the trial court erred in allowing two attorneys to testify about his character and refusing to allow a voir dire of the attorneys. Austin argues that the testimonies of two attorneys as to his reputation for veracity violated the attorney-client privilege. The attorney-client privilege:

> [P]rotects communications from the client to the attorney made in confidence

for the purpose fo obtaining legal advice. It shields communications from the lawyer to the client only to the extent that these are based on, or may disclose, confidential informtion provided by the client or contain advice or opinions of the attorney.
United States v. Neal, 27 F.3d 1035, 1048 (5th Cir. 1994).

When the attorney-client privilege is asserted, the district court should decide whether an attorney-client relationship or whether an exception or waiver applies. A defendant asserting the privilege has the burden of proving the existence of an attorney-client rleationship. To do that, he must show that he made the communication at issue to this lawyer for the purpose of securing a legal opinion or legal services. Neal, 27 F.3d at 1048 n.24. This Court reviews factual findings made in the application of the attorney-client privilege for clear error and reviews the controlling law de novo. Id. at 1048.

After Austin testified, the court held a bench conference at which defense counsel objected to the Government's calling two attorneys, William Hoffman and William Wright, to testify about Austin's reputation for truthfulness. Defense counsel asked to examine them on voir dire, asserting that Hoffman and Wright had prevously represented Austin. The court denied the defense request and allowed the Government to call the attorneys.

On direct examination, Hoffman testifed that Austin's reputaton for truth and honesty is "very bad". On cross-examined, Hoffman testified that he represented Austin two or three times in the 1980s. Hoffman stated that Austin owes him money. After receiving a demand letter from another attorney representing Austin, Hoffman obtained a declaratory

judgment against Austin to the effect that Hoffman had no liability to him

On direct examination, Wright testified that he had delay with Austin in the past but never served as his attorney. Austin's reputation for truth and honesty, Wright stated, was "bad" on cross-examination, Wright stated that he was not a party to the lawusit between Hoffman and Austin and was not associated with Hoffman.

We find no error in the district court's decision to allow the attorneys without voir dire, Hoffman and Wright did not testify about any communications made in confidence for the purpose of obtaining legal counsel, nor did the Government ask them to so testify. The testimonies revealed no information protected by the attorney-client privilege.

Austin also argues that the lawyer's

testimonies violated the "work product" doctrine. That doctrine protects against the disclosure of matters that an attorney prepared on behalf of his client in anticipation of litigation. United States v. Davis, 636 F.2d 1028, 1040 (5th Cir.), cert. denied, 454 U.S. 862, 102 S.Ct. 320, 70 L.Ed2d 162 (1981). Hoffman and Wright did not disclose such materials, and the Government did not ask them to do so.

Asutin also argues that the testimonies violated the "last link" doctrine. That doctrine provides that the attorney-client privilege protects the client against his lawyer's disclosure to the Government of the last link in a chain of probative, inculpatory evidence. In re Grand Jury Subpoena (Reyes-Requena), 926 F.2d 1423, 1426 (5th Cir. 1991). For example, when the Government already possesses the substance of communications

between a lawyer and his client, the lawyer may not identify the client to the Government, which would be the "last link" in the chain of evidence showing confidential communication. Id. at 1431-32. Hoffman and Wright gave no such information.

The district court is charged with exercising reasonable control over the mode of interrogating witnesses to avoid needless use of time. Fed. R. Evid. 611. Austin has shown no error in the district court's refusal to allow voir dire examination of the attorneys. Considering that they divulged no privileged information, we find this contention to be without merit.

Issue 2- Jury Instruction

Austin contends that the district court's jury instruction defining "corruptly" was incorrect in that it

should have been coordinated with the definition of "knowing," in order to address Austin's defense that he did the acts in good faith. He admits that he did not object to the jury instructions.

Parties are required to challenge errors in the district court. When a defendant in a criminal case has forfeited an error by failing to object, this Court may remedy the error only in the most exceptional cases. United States v. Rodriguez, 15 F.3d 408, 414 (5th Cir. 1994). The Supreme Court has directed the courts of appeals to determine whether a case is exceptional by using a two-part analysis. United States v. Olano, __ U.S.__, 113 S.Ct. 1770, 1777-79, 123 L.Ed2d 508 (1993).

First, an appellant who raises an issue for the first time on appeal has the burden to show that there is actually an

error, that it is plain ("clear" or "obvious"), and that it affects substantial rights. Olano, 113 S.Ct. at 177-78; Rodriguez, 15 F.3d at 414-15; Fed. R. Crim. P. 52(b). This Court lacks the authority to relieve an appellant of this burden. Olano, 113 S.Ct. at 1781.

Second, the Supreme Court has directed that, even when the appellant carries his burden, "Rule 52(b) is permissive, not mandatory. If the forfeited error is "plain" and affects substatial rights", the court of appeals has authority to order correction, but is not required to do so. Olano, 113 S.Ct. at 1778 (quoting Fed.R.Crim.P. 52(b). As the Court stated in Olano,

> the standard that should guide the exercise of [this] remedial discretion under Rule 52(b) was articulated in United States v. Atkinson, [297 U.S. 157] (1936). The Court of Appeals should correct a plain forfeited error affecting substantial rights if the error "Seriously affect[s] the fairness,

integrity or public reputation of judicial proceedings."

Olano, 113 S.Ct at 1779 (quoting Atkinson, 297 U.S. at 160). Thus, this Court's discretion to correct an error pursuant to Rule 52(b) is narrow.

The statute that Austin was convicted of violating provides criminal penalties for

> [w]hoever... directly or indirectly, corruptly gives, offers or promises anything of value to any public official or person who has been selected to be a public official, or offers or promises any public official or any person who has been selected to be a public official, to give anything of value to any other person or entitity with intent... to influence any official act...

18 U.S.C. Section 201(b)(1)(A)(emphasis provided).

The court instructed the jury that a finding of guilt requires proof:

> First: That the defendant directly or indirectly gave or offered something of value to Linda Dickerson, a public official; and
>
> Second: That the defendant did so

corruptly with intent to persuade the public official to do an act in violation of her lawful duty.

An act is "corruptly" done if it is done intentionally with an unlawful purpose.

Several paragraphs later, the court instructed, "The word 'knowingly,' as that term has been used from time to time in these instructions, means that the act was done voluntarily and intentionally not because of mistake or accident." The term "knowingly, " however had not been mentioned previously in the instructions and is not an element of the offense of bribery of a public official.

Austin argues that the instructions confused the jury because even if it found that an act was not done "knowingly," it would not correspond to the good faith defense that he was putting forth at trial. We find Austin's contention to be without merit. If he wanted a different

instruction to coincide with his good faith defense, he should have made such a request to the district court. He cannot now argue that the jury instuction was plain error.

Issue 3- Discovery of IRS Agent's Rough Notes

Austin contends that he should have been allowed discovery of Dickerson's rough notes of a conversation that she had with him on January 13, 1994, the day before the taping began. Dickerson described the conversation in an affidavit that she made shortly after the conversation but destroyed her rough notes. Dickerson testifed that, in that conversation, Austin made a bribe overture. Austin testifed that she lied. Austin argues that the rough notes might have revealed whether he actually made a bribe overture.

The Government responds that Dickerson destroyed her rough notes, making the issue moot. Austin responds that the destruction of notes is an obstruction of justice and should be condemned in all cases.

The Federal Rules of Criminal Procedure require the Government to disclose, upon the defendant's request, the substance of any oral statement that he made to a Government investigator, before or after arrest. Fed.R.Crim.P. 16(a)(1)(A). Austin moved for discovery of the rough notes. The district court denied the motion. This Court reviews alleged discovery errors for abuse of discretion, and the defendant must show prejudice to his substantial rights. United States v. Ellender, 947 F.2d 748, 756 (5th Cir. 1991).

Austin offers only speculation about

the evidentiary worth of Dickerson's rough notes. Because they had been destroyed prior to the discovery request, Austin fails to show that the district court's ruling was in error. Moreover, he has made no showing that the notes were destroyed in order to obstruct justice. Finding no prejudice to his substantial rights, we reject this contention.

Issue 4- Discovery of Tax Audit File

Austin contends that the district court erred by not granting a continuance in order that he could get the IRS tax audit file. He contends that the court's action violated Fed.R.Crim.P.16 and Brady v. Maryland, 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed2d 215 (1963). In addition to discovery of the defendant's statements, Rule 16 provides for discovery of documents and tangible objects in the possession of the Government.

Red.R.Crim.P.16(a)(1)(B). To show a Rule 16 violation, Austin must show abuse of discretion and prejudice to his substantial rights. Ellender, 947 F.2d at 756. To show a Brady violation, Austin must show that the government suppressed evidence, that the evidence was favorable to him, and that it was material either to guilt or punishment. Moore v. Illinois, 408 U.S. 786, 794-95, 92 S.Ct. 2562, 2568, 333 L.Ed2d 706 (1972).

The district court denied the request for a continuance because it felt the evidence contained in the file was not relevant to Austin's guilt. Defense counsel stated tht he wanted the file in order to prove that Dickerson had made "an offer for a hardship case" to Austin. However, our review of the record reveals that Dickerson freely admitted she was going to make such an offer to Austin.

Thus, the evidence in the file would hve been cumulative.

Austin now argues that the files releated to Dickerson's credibility and to his motive for trying to bribe her. He also argues that the file would be relevant to sentencing. Our review of the testimony reveals that Austin never brought this argument to the attention of the trial court. See United States v. Hosford, 782 F.2d 936 (11th Cir.)(holding that objections must be presented to the district court in order to preserve them on appeal) cert denied, 476 U.S. 1118, 106 S.Ct. 1977, 70 L.Ed2d 660 (1986). We therefore cannot say that the court acted unreasonably in refusing to grant the continuance, when it heard no compelling reasons for a continuance. We find this contention to be without merit.

Issue5-Cross-examination Regarding Tax

Refund

Austin contends that the district court erred in sustaining the government's objection to his cross-examination of Dickerson. The trial court has wide latitude to reasonably limit cross-examination. A court may impose limits to prevent harassment, prejudice, confusion, repetition, danger to a witness, and testimony that is only marginally relevant. The limitations are reviewed for clear abuse of discretion. United States v. Barksdale-Contreras, 972 F.2d 111, 115 (5th Cir. 1992), cert denied, 113 S.Ct. 1060, 1614 (1993).

Austin testified that the IRS had sent him a letter stating that he was due a $226,000 refund. The jury also heard a taped meeting between Dickerson and Austin in which Austin mentioned the possibility of the IRS returning [between $220,000 and

$230,000/$220,000 or 230,000] to him. Dickerson responded, "I already explained that to you. That was an error." Austin replied, "I know that, I know that." Austin's counsel attempted to question Dickerson about whether she had spoken to Austin and Bill Gilkey, Austin's accountant, about the letter that stated that Austin was due a refund.

Defense counsel asked Dickerson, "Did [Austin and Gilkey] make numerous requests for records to see where [the IRS] came up with the figures and why there was one person saying one thing and somebody else saying something else? The Government objected on grounds relevancy and hearsay. The court sustained the objection.

Austin argues that, because the Government put on evidence of Austin's tax debt of $330,000, he should have been permitted to put on evidence of a

prospective tax refund of approximately $220,000. Counsel's question on cross-examination, though, goes to what Dickerson, Austin and his accountant might hav said and not about the alleged proseptive refund. It does not address whether Austin was actually due a refund. Furthermore, Austin stated in a taped conversation that he knew that the refund letter was a mistake. Austin has shown no abuse of discretion.

Issue 6- Eight-level Increases

Austin contends that the district court erroneously increased his Sentencing Guidelines offense level by eight points pursuant to U.S.S.G. Section 2C1.1(b). Under U.S.S.G. Section 2C1.1(b), the base offense is increased by eight levels

[i]f the value of the payment, the benefit received or to be received in return for the payment or the loss to the government

from the offense, whichever is greatest, exceeded $2000, increase by the corresponding number of levels from the table in Section 2F1.1" or "[i]f the offense involved a payment for the purpose of influencing an elected official or any official holding a high-level decision-making or sensitive position." Section 2F1.1 provides for an increase of eight levels when the amount involved is between $200,000 and $350,000. U.S.S.G.Section 2F1.1(b)(1)(I). Thus, the eight-level increase is not erroneous if it was applied pursuant to either condition.

This Court reviews the sentence to determine whether the district court correctly applied the Sentencing Guidelines to factual findings that are not clearly erroneous. United States v. Montoya-Ortiz, 7 F.3 1171, 1179 (5th Cir. 1993). A factual finding is clearly

erroneous if it is not plausible in light of the record taken as a whole. Anderson v. City of Bessemer City, 470 U.S. 564, 573-76, 105 S.Ct. 1504, 84 L.Ed2d 518 (1985). Legal conclusions regarding the Sentencing Gudelines are reviewed de novo. Montoya-Ortiz, 7 F.3d at 1179. Austin's tax preparer testifed that Austin did not owe any taxes and that in fact Austin was owed a refund. At the sentencing hearing, an IRS agent testified that at the time of the bribery, Austin owed $292,344.71 to the IRS. He also testified that the errors resulting from information incorrectly entered into a computer at the main IRS office in Dallas, Texas. At several places in the trial record Austin appears to have admitted that he owed the money to the government; although he now disclainms ever admitting owing the government anything.

We find no clear error in the court's finding that an eight level increase was warranted under U.S.S.G. Section 2F1.1(b)(1)(I). The testimony of the IRS agent provided a reasonable basis for the district court to believe that Austin owed the government between $200,000 and $300,000 in taxes. Having determined that an eight level increase was warranted by the approximately $300,000 in benefits that Austin would have inured, we need not address his arguments concerning whether he attempted to bribe an official in a high-level decision-making or sensitive position. See U.S.S.G. Section 2C1.1(b)(2).

Austin also argues that the Government's evidence at sentencing was legally incomplete because no documentary evidence was presented showing his tax liability. Austin cites no authority for

the proposition that the loss must be proved by documentary evidence rather than by testimony and we have found none. We find this contention to be without merit.

Issue 7-Poor Health

Austin argues that the district court erroneously refused to grant a downward departure that he had sought on the ground of poor health. He argues, first, that the district court failed to make findings with respect to his health and, second, that accurate findings could result in the downward departure.

A sentencing court is required to consider "the need for the sentence imposed ... to provide the defendant with needed educational or vocational training, medical care, or other correctional treatment in the most effective manner. " 18 U.S.C. Section 3553(a)(2)(D). "[T]here may be extrordinary circumstances where

age and health may be relevant to the sentencing decision." United States v. Guajardo, 950 F.2d 203, 208 (5th Cir. 1991)(citing U.S.S.G. Section 5H1.1, 5H1.4, cert denied, --U.S.--, 112 S.Ct. 1773, 118 L.Ed.2d 432 (1992). A refusal to depart is unreviewable unless the refusal was in violation of the law. United Sates v. Mitchell, 964 F.2d 454, 462 (5th Cir. 1992)

When a defendant objects to facts in the PSR, the district court must make either a finding regarding the objection or a determination that no finding is necessary because the controverted matter will not be taken into account at sentencing. Fed. R. Crim. P. 32 (c)(3)(D); United States v. Sherbak, 950 F.2d 1095, 1099 (5th Cir. 1992). Nevertheless, "Rule 32 does not require a catechismic regurgitation of each determined and each

fact rejected when they are determinable from a PSR that the court has adopted by reference." Sherebak, 950 F.2d at 1099.

The PSR described Austin's history of heart disease, including a heart attack on August 9, 1993, for which Austin was hospitalized for ten days. As of September 28, 1993, Austin was bedredden, using oxygen and wating the implantation of a pacemaker. Austin asserted that the conditon merited a downward departure.

Austin submitted an October 22, 1993, affidavit of a physician that described Austin as having a "serious heart condition" and that Austin was taking the large doses of medication for the problem. Austin experiences "congestive heart failure, a currently uncontrolled heart rate problem, and adult diabetes." Austin was awaiting the surgical implantion of a pacing device. The doctor stated that

imprisonment would be detrimental to Austin's health and that immediate access to high-quality medicare care would be required. At sentencing, the district court expressly stated that he was considering whether Austin's health condition necessitated downward departure. The court then found that no mitigating circumstances warranted a downward departure. A refusal to depart is unreviewable unless the refusal was in violation of the law.

United States v. Mitchell, 964 F.2d454, 462 (5th Cir. 1992).

Because the district court followed the correct procedure and did not violate the law in sentencing Austin, we reject this contention as meritless.

Issue 8 -Section 2255 Motion

Asutin argues that his Section 2255 motion was not premature even though his

direct appeal was still pending. We however find that the appeal of the district court's dismissal of the Section 2255 motion is now moot. An action is moot if the court cannot affect the rights of the litigants in the case before it. Defunis v. Odegaard, 416 U.S. 312, 316, 94 S.Ct. 1704, 1705, 40 L.Ed2d 164 (1974). Because we have already disposed of Austin's direct appeal, he can now pursue a Section 2255 motion unfettered by procedural requirements. Fassler v. United States, 858 F.2f 1016, 1019 (5th Cri. 1988) cert. denied, 490 U.S. 1099, 109 S.Ct.2450, 104 L.Ed2d 1004 (1989)(holding that " criminal defendant may not collaterally attack his conviction until it has been affirmed on direct appeal"). Thus, our resolution of this case would have no effect on the litigants as to the Section motion and the question

presented is moot.

Becasue of the inter-relationship of the Section 2255 motion and the motion of release pending appeal, the appeal of the denial of the motion to release is also dismissed.

CONCLUSION

For the foreging reason, Austin's conviction and sentence are AFFIRMED and the appeal of the district court's dismissl of his Section 2255 motion and his motion for release pending a hearing on the Seciton 2255 motion is DISMISSED as moot.

IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

U.S. COURT OF APPEALS
FILED
DEC 30 1994
CHARLES R. FULBRUGE III
CLERK

No. 94-10019
No. 94-10331

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

HILLARD E. AUSTIN,

Defendant-Appellant.

Appeals from the United States District Court for the Northern District of Texas

ON PETITION FOR REHEARING

(December 30, 1994)

Before DUHÉ, WIENER, and STEWART, Circuit Judges.

PER CURIAM:

IT IS ORDERED that the petition for rehearing filed in the above causes is DENIED

ENTERED FOR THE COURT:

United States Circuit Judge

CLERK'S NOTE:
SEE FRAP AND LOCAL RULES 41 FOR STAY OF THE MANDATE.